United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

In the Court of Appeals

OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, A. D. 1907.

No. 1832.
No. 11, Special Calendar.

JOSEPH PAOLUCCHI, APPELLANT,

vs.

UNITED STATES.

BRIEF FOR APPELLEE.

Statement of the Case.

This is an appeal from an order of the court below overruling a motion of the defendant for a new trial. It is nothing more. The record shows no single exception, except the one taken after the verdict, and at the conclusion of the hearing on a motion for a new trial, when the court, after a thorough consideration of the motion, denied the same.

The appellant, Joseph Paolucchi, was indicted for the murder of Elizabeth Dodge, on the 13th day of September, 1906. He was put upon trial before Mr. Justice Barnard and a jury March 6, 1907, and on March 12, 1907, was found guilty as indicted, in the first degree (Rec., p. 4). The evidence offered at the trial was overwhelming in establishing, as against the defendant, the deliberate and revengeful extinction of human life. The

victim of the murder was Elizabeth V. Dodge, a young girl of 16 years of age. She lived at 437 Fifth street northeast. From the testimony of her mother, Elizabeth S. Dodge, it appeared that the appellant became acquainted with the victim in January, 1906, at the house of one Laverine, at 413 Fifth street northeast, who was a neighbor and friend of the Dodges. From that time until September 13, 1906, the day of the murder, appellant was a casual and sometimes frequent caller at the Dodges, or at Laverines, and mingled in the different pleasures and social pastimes of these families, in which deceased usually was present and took part (Rec., pp. 12–13). Mrs. Dodge conducted a small store, selling confectionery, cigars, soda water, and notions. The appellant was paying some attention to the deceased, and from the day of his meeting her in January until the murder, the following September, was in her company frequently and took her to dances, the theater, and in the summer time to different summer resorts (Rec., pp. 18–19). The appellant was a shoemaker and lived in the neighborhood.

Coming to the day of the murder, it appeared that the Dodge family had recently moved to the premises 437 Fifth street northeast. On the day before the shooting, the 12th of September, the appellant was seen in the vicinity of the Dodge house (Rec., p. 16). He was hovering around that vicinity that day. In the evening he called on Mrs. Dodge between 7 and 7.30 o'clock. The deceased, Lizzie Dodge, had gone to a carnival at Fifteenth and H streets northeast (Rec., p. 13). Appellant asked Mrs. Dodge to go with him to the carnival, but she was unable to go as her daughter was out and she had no one to leave in possession of her store. Appellant asked Mrs. Dodge if she were satisfied with his keeping company with Lizzie, and she replied she had left that to the choice of the girl. Mrs. Dodge had not up to that time considered him a suitor. On the same

evening her daughter returned from the carnival between 10 and 20 minutes of 10 o'clock in the company of some friends. As soon as her daughter had arrived Paolucchi returned and followed the deceased into a room in the rear of the Dodge store, where he engaged the girl in some conversation. Upon Mrs. Dodge going into this room, the appellant complained that Lizzie did not desire his company any more, and Mrs. Dodge replied that they would have to fight that out between them (Rec., p. 14). Appellant then taxed the deceased with "having some other fellow," and she replied that she had not and that she did not intend to keep steady company (Rec., p. 15). She handed him his ring and asked him for hers which he had been wearing. He did not wish to surrender the ring at first, but finally did so and said: "I will be back tomorrow and give you everything you want" and said she would "be sorry for it tomorrow." He left at 20 minutes to 11, and on leaving said he "would be back tomorrow and give her all she was looking for" (Rec., p. 15).

The next day, September 13, 1906, appellant appeared in front of the premises, 411 Fifth street northeast, about 12 o'clock, noon. There was an alleyway or driveway next to these premises, which were occupied by the Laverines, and appellant was standing inside the alleyway or driveway. Upon Mrs. Dodge seeing him, he inquired where Lizzie was, and was told that she was in the store at 437 Fifth street, and he said he thought she was in No. 411. Appellant was next seen in the Dodge store the same afternoon about 2 o'clock. He came in with Mr. and Mrs. Laverine and Mrs. Laverine's sister, and made some purchases of soda water and refreshments. At that time he made complaint to Mrs. Dodge that Lizzie had "treated him dirty" (Rec., p. 17). He asked if Lizzie was not afraid of him. During this afternoon Lizzie, the victim, was engaged in arranging the

house, moving the furniture and the like, and in going backward and forward from the house where the Dodges formerly lived, to 437 Fifth street, which they now occupied. At 4.30 Mrs. Dodge heard two pistol shots. Her daughter had just gone out on the street on an errand of the witness, to lock up the other house, but finding she had the wrong key, returned to get the right one. As she was coming back the pistol shots were heard. Upon the witness running to the door, she saw the appellant fire the third shot into her daughter, who had fallen on the sidewalk in front of the premises, 425 Fifth street northeast. When the witness reached the victim she did not say anything, but there was apparently a look of recognition. Some gentlemen in the neighborhood removed her to her house, 437 Fifth street, but she was dead when brought in (Rec., p. 18).

The autopsy was performed by Dr. Glazebrook, and it disclosed three thirty-two calibre bullet wounds, all serious, and two of them necessarily fatal. Death was due to hemorrhage due to the three very serious bullet wounds (Rec., p. 32).

Joseph Petersen, a member of the Metropolitan Police Force, testified that on the thirteenth day of December he saw defendant fire the three shots in succession at deceased, and then fire one shot at himself and then fall over beside her. The appellant was taken to the Casualty Hospital, and while on the operating table was asked by Dr. Romaine why he had shot the girl, and he said: "Well, she treated me like a dog and I shot her" (Rec., p. 32).

Victoria Laverine, who lived at 413 Fifth street N. E., and had known appellant for four years, saw him in the morning of the shooting and again about 12 o'clock the same day; he was then walking in the street and in her back yard, and later in the afternoon she saw him come around, and he said he felt very bad and said, "It was a funny day for him; that he was disappointed about some-

thing, and that some one in the neighborhood had made a fool of him, and that he didn't know what he was going to do, but that Lizzie was going to feel sorry for what she had done to him" (Rec., p. 33).

On the same day Michael Laverine, husband of Victoria, also saw appellant, and to him appellant also complained that he was mad, and looked sore. Witness suggested that he forget about it. Appellant told him he had met the girl the night before and had a disagreeable talk with her. He gave witness ten cents to get some beer. Witness suggested that there were plenty more girls, "that there might be one to fill the bill and to be happy." He was sitting on a chair where he could see witness and the street also. All at once he got up and said, "all right," and in two or three minutes the shots were heard (Rec., p. 34).

The witness, Charles Dodge, saw the appellant on the day of the shooting, about 12 o'clock, coming down Fifth street, and later he saw him at 1 and 2 o'clock, respectively (Rec., p. 34).

The witness, Bessie Irene Bishop, also saw the appellant on the day of the shooting loitering around the vicinity of the Dodge house (Rec., p. 34).

Three other witnesses testified to having seen the defendant on the day of the shooting and to having seen him actually fire the three shots into the body of the girl.

William Herrler, who lived at 408 Fifth street, saw appellant standing in a little alley of that street on the day of the shooting. Appellant was leaning against a fence. His victim, Lizzie Dodge, walked by and appellant walked after her, three houses below, then fired the three shots in her body. He then fired the fourth shot at himself and fell down (Rec., p. 34).

Henry W. Hines was employed at the Capitol. He heard two pistol shots about a block or a block and a

half away. He looked in that direction and saw the defendant fire the third shot and then fire a shot at himself. The appellant had gotten up and started a sort of run or staggering. Witness stopped him and turned him over to the police (Rec., p. 35).

Officer Nantz testified that on the day of the murder he was at the corner of Fifth and E streets northeast, and heard the revolver shot; saw the appellant and the girl on the street; saw the girl was falling; that he saw appellant shoot her twice more and then shoot himself. This officer went to the hospital and kept guard over the appellant. On different occasions appellant talked to him about the affair. He, appellant, said he was standing by the fence when the girl, Lizzie, went up to lock the house, and that when she came down he spoke to her and asked her why she treated him like that, and that she turned to him and said, "Treat you like what? How have I treated you?" He said, "You know how I have treated you and you have treated me like a dog." Appellant further told the officer that he, appellant, said, "I have been too good to you, spent all my money and you treat me like a dog," and that the girl said "O! I guess I act all right," and turned to walk away. Appellant told the officer that he had the revolver sometimes in his bed-room and did not carry it, but brought it along with him on that day. Appellant did not give any further reason for the shooting. He said he met the girl on the previous evening with two other girls and two other fellows. She spoke to him and introduced him and turned away, paying scarcely any attention to him, and treated him as he said, "Like a dog" (Rec., p. 35).

This was the substance of all the testimony offered in behalf of the Government.

The defendant below offered certain evidence to prove that he is an Italian, residing in this country about six years, and has heretofore borne a good reputation for

peace and good order; that during the summer of 1906 he paid much attention to this girl and was often seen in her company, and apparently manifested much interest in and concern for her. He had also told his associates and friends of his love for her and that he was going to get married (Rec., p. 36).

This was the substance of all the evidence offered on behalf of the defendant.

No single exception was taken by the defendant to any of the evidence, which as the record shows was singularly clear and direct to prove the issue. The case was submitted to the jury and the defendant found guilty as indicted.

After verdict counsel for the defendant filed a motion for a new trial, upon the usual grounds, and complaining of certain language used by the Assistant United States Attorney in his address to the jury (Rec., pp. 4, 5).

This motion was filed March 12, 1907, and came on for hearing April 19, 1907. On the very day of the hearing, April 19, 1907, and without notice to the Government, the appellant filed two affidavits which had no relation to his motion for a new trial, one affidavit by Francis M. Shelton and one by Kate A. Birmingham, charging in effect that one of the jurors empanelled in the case, and who was one of those rendering the verdict, entertained strong feelings of enmity against the Italian race, and had said during the summer of 1906 "That every Italian ought to be driven out of the country or hanged" (Rec., pp. 5, 6).

The affidavit of Kate A. Birmingham, who it was admitted at the hearing of the motion was the estranged wife of the juror Birmingham, concluded that it was prompted to be made on behalf of Paolucchi "whom public sentiment largely adjudges to have been love crazed at the time of the alleged homicide." The court out of abundant anxiety for the interests of the convicted Paolucchi, allowed the affidavits to be filed and to be considered, and allowed the defendant to amend his motion

for a new trial by including the grounds of the alleged bias of the juror Birmingham against the Italian race. The court also allowed the defendant to file with his amended motion his own affidavit that he had not known or suspected the bias of the juror Birmingham against the Italian people until after the rendition of the verdict and after the expiration of the time limited for the filing of the motion for a new trial (Rec., pp. 7, 8).

The court had the motion under consideration from the day of its hearing and submission on April 19, 1907, until May 10, 1907, when, after careful consideration of the motion and the affidavits, the court overruled the motion and denied a new trial. To this ruling of the court the defendant excepted. Thereupon the court pronounced judgment and the defendant prayed his appeal to this court (Rec., p. 38).

This is the only exception appearing on the record, and the appeal is accordingly prosecuted upon it alone.

ARGUMENT.

I.

No Jurisdiction on This Appeal.

It appears at the outset that the appeal herein is taken from the order of the court overruling a motion for a new trial. There is no other exception in the whole record. There is consequently nothing before this court except the consideration of the question whether the court below should have granted a new trial.

That there is no jurisdiction in this court to consider such an appeal has not only been specifically settled by the statutory declaration of the Code in section 226, providing for the jurisdiction of this court on appeal, but has also been abundantly settled by the decisions of this

court. Indeed the matter would seem to be so far established as to be removed beyond the pale of serious discussion. The decision on the motion for a new trial is lodged within the discretion and sound judgment of the trial court, and its action in overruling a motion for a new trial may not be complained of as error. In the last case in which this court had occasion to affirm such a rule it said:

> "We have so repeatedly held in this court that the action of the trial court upon a motion for a new trial is not the subject of review here that we must suppose that the assignment of error made in that regard in this case was made through inadvertence. Such assignment, of course, can not be considered."

West *vs.* U. S., 20 App. D. C., 347, 351.
Price *vs.* U. S., 14 App. D. C., 391, 401.
U. S. *vs.* Woods, 1 McAr., 241.

The same doctrine has received similar enunciation from the Supreme Court.

> "The first ten assignments of error are based upon a bill of exceptions setting out simply the grounds upon which the accused asks that a new trial be granted to him. It is only necessary to say that the refusal of the court to grant a new trial can not be assigned for error in this court."

Addington *vs.* U. S., 165 U. S., 185.
Smith *vs.* Miss., 162 U. S., 592.
Henderson *vs.* Moore, 5 Cranch., 11.

> "The overruling of the motion for a new trial is next assigned for error. We had supposed that it was well understood by the bar that the refusal of a court of the United States to grant a new trial can not be reviewed upon writ of error."

Blitz *vs.* U. S.. 153 U. S., 308, 312.

II.

Even Granting Jurisdiction, Nothing is Shown to Render the Juror Incompetent, or the Trial a Nullity.

Even if we prescind from the fact of this appeal being based upon the refusal of the court below to grant a new trial, and for the sake of argument grant jurisdiction to this court to entertain the question raised, it will not appear that there was any such bias on the part of the juror which would disqualify him, or which would place the stamp of nullity upon the trial.

It is not claimed that in overruling the motion for a new trial the nisi prius court abused his discretion. It is simply contended that the juror Birmingham was biased because of what the two affidavits alleged, and that upon such a showing the court should have granted a new trial despite the explicit denial of the juror Birmingham on his voir dire (Rec., p. 11) as follows:

> "Q. Have you any business relations with Italians?
>
> A. No, sir; I never have had.
>
> Q. You have no prejudice against the nationality?
>
> A. No, sir.
>
> Q. You have no prejudice against a man because he is a Catholic, have you?
>
> A. No, sir.
>
> Q. Take the case of a young man disappointed in love who gives way to his emotions; have you any prejudice against a man of that kind?
>
> A. No, sir; I would certainly sympathize with him."

This court now is asked to shift the discretion of the court below and practically give another consideration to the affidavits and the motion. *The motion was decided in the court's sound discretion and judgment.*

How was this bias on the part of the juror attempted

to be shown? Who were the affiants? What was the manner of procuring the affidavits? Were they filed informally and without giving notice to the Government? Were they presented to the court during the very progress of the hearing? Were they genuine? All these were questions which the court below necessarily had before him in the consideration of the motion for a new trial and of these affidavits, and they are all questions with which this court is in no manner enabled to deal. Furthermore, the court below had before him the juror Birmingham himself, his examination as above given, and was enabled to observe his conduct both on his voir dire and during the trial. On his voir dire the counsel for appellant specifically examined him with regard to his bias against an Italian and his bias, if any, against one who suffered from the alleged disappointment the defendant claimed he sustained in his suit for the girl he killed. The court satisfied himself that the juror was acceptable, and the court's knowledge of these facts were all material in his consideration of the motion for a new trial and of the affidavits, and in fact, so far indispensable that this court without such knowledge can not put itself in a position *of the court below, even though it had jurisdiction so to do.*

The motion for a new trial was argued on the 19th day of April and the court had it under consideration until the 10th of the month following. The affidavits which were filed, charging bias against the juror, were offered to the court on the day of the argument on the motion and without previously giving any notice thereof to the United States. It would have been perfectly competent for the court to have forbidden such improper practice and to have declined to allow the affidavits to have been filed, but out of abundant caution in safeguarding the rights of the accused the court suffered the affidavits to be received and to be considered with the

motion. Thus the action of the court was in favor of the appellant. The question of the bias of this juror was, therefore, thoroughly considered by the court.

The court had before it the examination of the juror on his voir dire, and if the court had any doubt about the juror being qualified the court could have sent for the juror and examined him again.

It was not a case where the court refused to use its discretion, but one where every circumstance material to the consideration of the validity of the trial was duly examined and the decision of the court finally rendered in his sound judgment and discretion, based upon a thorough review of all the circumstances of the case. The court overruled the motion because it was opposed to having a case tried once before a jury and tried over again by affidavits, one of which was issued by the estranged wife of the juror against whom it was directed, and which as earnest of its genuineness declared that "public sentiment" had largely judged Paolucchi to have been "love crazed" at the time of the homicide.

As stated before, it is not claimed here that the court had abused his discretion in overruling this motion. Accordingly it can not be said that the court did not exercise his discretion, or that by reason of the circumstances shown by the affidavits, the juror should have been found incompetent as a matter of law. In such a case it is evident this court will not review the action of the court below.

> "No less stringent rules should be applied by the reviewing court in such a case than those that govern any consideration of the motion for a new trial, because the verdict is against the evidence. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left

nothing to the conscience or discretion of the court."

Reynolds *vs.* U. S., 98 U. S., 145, 156.

"The consideration of a motion involved an inquiry of both law and fact and will not be disturbed unless it is manifest that the court has abused or exceeded his discretion."

Horton *vs.* U. S., 15 App. D. C., 310, 319.

Press Co. *vs.* McDonald, 19 C. C. A., 516.

The Alleged Bias.

But going a step further to the consideration of the question of the bias itself, which the affidavits charge, it will appear that no such bias was even charged, much less proved, which would be sufficient to disqualify the juror. The pith of the affidavit is that the juror Birmingham had no very good opinion of the Italian race as such, but thought that every Italian ought to be driven out of the country or hanged. Neither affidavit charged that the juror has any particular bias against the defendant Paolucchi; that he even knew Paolucchi or had any bias or prejudice against one charged with the crime for which Paolucchi was on trial. Neither affidavit charged that the juror Birmingham was unable to give an impartial trial, even admitting that he entertained feelings of enmity against the Italian race. It will thus be seen that the affidavits are collateral in what they charge. They do not relate to any feeling on the part of Birmingham to the individual Paolucchi whatever, but relate merely to the juror's general feeling against the collective race. Even, however, if they had related to the individual Paolucchi and charged feelings of enmity by the juror against him, the juror's explicit statement on his voir dire that he entertained no such feeling of enmity or prejudice would be sufficient to counteract the affidavits.

U. S. *vs.* Schneider, 21 D. C., 381.

The Charges in the Affidavits are General and Collateral.

An analysis of the affidavits shows (1) that the expression of enmity, as alleged, is general as against the Italian race, and (2) that they were made, in point of time, six months prior to the trial. Accordingly, first, the affidavits are in no wise connected with the individual, Paolucchi, and second, the alleged expressions of the juror in point of time have no relevancy or connection with the crime or the case on trial.

Even, therefore, if the affidavits were true, and six months before the trial the juror, Birmingham, had feelings of enmity for the Italian race, non constat, that at the date of the trial he was biased against this particular individual, when he took solemn oath to true deliverance, make between him and the Government.

It is settled, however, by the courts that such general expressions as an unfavorable opinion of a race or class of people are too inconclusive to disqualify the juror or to set aside a verdict.

In the case of Balbo *vs.* State, 80 New York, 484, the defendant was an Italian, on trial, indicted for murder. A juror, empanelled at said trial, had testified on his voir dire, referring to the nationality of the defendant, that "it was a race he was not particularly fond of, and didn't think much of, judging from those we have here." The juror was challenged and the court overruled the challenge, and this action was affirmed by the appellate court.

> "The fact that the juror may have had some prejudice against the Italian race was not, we think, a disqualifying circumstance. The opinion that the prisoner's character is bad is not a ground of particular challenge. The fact that the juror did not like the race to which the prisoner belonged was quite too inconclusive to justify a finding that he was incompetent."

Balbo *vs.* People, 80 New York, 484–498.

In general, mere expressions of theoretical prejudice against certain things without relating to the precise point involved in the bias against the prisoner and his case, are not sufficient to disqualify a juror.

> "But we think that the mere statement of a juror that he had formed an opinion that the general character of the defendant is bad will not sustain a challenge for particular cause, and that such an opinion, especially where the grounds of it or its strength or general character are not disclosed, does not per se disqualify him. If such rule should be established it might happen, as was well said by Strong, J., in the case of People *vs.* Lohman, that notorious criminals could not be tried at all."

People *vs.* Allen, 43 New York, 28–34.

One who without forming or expressing an opinion of the matter to be tried, formed an opinion that the laws had been outraged, is still competent as a juror.

U. S. *vs.* Hanway, 2 Wall., Jr., 139.

The charge of bias should relate to the precise point. In this case we see the charge of bias is against the Italian race. It does not relate to the defendant, Paolucchi. Thus, it has been held that an opinion on the part of a juror that the defendant had killed a man would not amount to the opinion that the defendant was guilty of murder, and the challenge to the competency of the juror was overruled.

Lowenburg *vs.* People, 27 N. Y., 336.

Granting everything contained in the affidavits, the charge amounts to nothing more than an unfavorable opinion of the defendant's nationality. This per se is not sufficient to disqualify.

1 Thompson on Trial, 173.

In the case at bar it must be remembered that it is not a case in which the juror has admitted bias on his voir dire. The juror expressly denied that he had any prejudice against the Italians, and from his examination the court held him to be competent. It is not, therefore, a case where this court is asked to review the competency of a juror because of his own expressions, but, on the other hand, to hold that the court below should have nullified a valid trial in which no exceptions were taken merely because two affidavits were without notice put on file charging some general expressions on the part of a juror six months before. Certainly a situation could not be more markedly clothed with circumstances calling for the exercise of discretion of the court than such a one as this.

It is, therefore, respectfully submitted that there is no jurisdiction in this court to entertain this appeal, but even if there should be, there would be no error in the record and the judgment should be affirmed.

Respectfully submitted.

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